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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES OF AMERICA ON THE relation of the Riverside Oil Company, a corporation, plaintiff in error,
v.
ETHAN A. HITCHCOCK, SECRETARY OF THE Interor.
} No. 632.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

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Special Assistant to the Attorney-General.
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Counsel for the defendant in error, not wishing to construe the leave granted to file supplemental briefs into permission to reargue the case at length, are unable to follow counsel for the plaintiff in error through the detail of their reply brief. Inasmuch, however, as one or two things therein contained seem to be particularly misleading, we will trespass upon the attention of the court to the extent of pointing out briefly wherein we deem the misconception to lie.

I.

It is said "that the Land Department acts (quasi) judicially and finally only with respect to questions of fact." And again it is argued conversely "that the Land Department can not act judicially *because* its determination of such question is not final, but always subject to review." (Reply brief, p. 1.)

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Apart from the manifest *non sequitur* in assuming that because it is not final it can not be judicial, it is clear that the statement that the Land Department acts judicially and finally only with respect to questions of fact is a combination of two distinct propositions: (1) The Land Department acts (quasi) judicially only with respect to questions of fact, and (2) that it acts finally only with respect to questions of fact.

The first of these propositions is wholly unsound, as was pointed out in our opening brief, on pages 30 to 37. The Land Department, in deciding upon an application to take public lands, must of necessity construe the law by virtue of which such application is made, and so exercise a judicial function.

The second proposition, that the decision upon a question of law is not final, is true only in the sense and to the extent that where, upon an admitted state of facts, the Land Department has, under a mistaken construction of the law, issued a patent to A, when under a true construction of the law it should have issued it to B, a court of equity having territorial jurisdiction over the land itself will, upon a direct proceeding for the purpose, declare A to hold the title in trust for B and decree that he convey it to B accordingly. Such an attack is not collateral, but direct. (*Lee* v. *Johnson*, 116 U. S., 48, 49.)

But the power of the supreme court of the District of Columbia upon an application for a writ of mandamus is an altogether different matter. It has no power to determine land titles in California. Its power is

strictly limited to commanding the performance of a simple, definite ministerial duty. It has no power to construe statutes for the Land Department and to impose the construction upon that Department. It may, indeed, inquire whether the Land Department is acting within the scope of its jurisdiction, as in *Noble* v. *Union River Logging Co.* (147 U. S., 165, 176, 177). But jurisdiction being conceded to be in the Land Department, the court of the District has no power to decide anything for the Land Department or to do for that Department any adjudicative act or to substitute its own construction for the construction of the Department. Speaking of the ordinary duties of the head of an executive department, this court has said:

> He must exercise his judgment in expounding the laws and resolutions of Congress under which he is from time to time required to act. * * * If a suit should come before this court which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a Department. And if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in *a case in which they have jurisdiction*, and in which it is their duty to interpret the act of Congress, in order to ascertain the rights of the parties in the case before them. The court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment in any case where the law authorized him to exercise

> discretion or judgment. Nor can it by mandamus act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care in the ordinary discharge of his official duties. (*Decatur* v. *Paulding*, 14 Pet., 497, 515.)

While the courts are empowered to construe the acts of Congress whenever they are involved in cases properly before them, this does not confer the power to *create* a case for the very purpose of making such construction. If the statute be one which an executive officer must exercise judgment and discretion in order to administer, the construction of it is a part of his administrative duty. For the performance of this duty of construction, involving as it does the exercise of judgment and discretion, the executive officer is free from interference and control. Mandamus lies against him only when his action involves no such function. Unless it be plainly and definitely ministerial, the court has no jurisdiction over him. The mere circumstance, then, that in some case within its general jurisdiction the court would be at liberty to construe the same statute is a wholly insufficient ground for assuming a jurisdiction for the purpose of imposing a construction. The construction can be given only in a case in which jurisdiction is already present. To hold otherwise is to hold that courts may sit on appeal upon the whole administrative business of the Executive.

Applying the same rule to the duties of the Commissioner of Pensions, this court again said:

> He adopted an interpretation of the law adverse to the relator, and his decision was confirmed by the Secretary of the Interior as evidenced by his signature of the certificate. Whether if the law were properly before us for consideration, we should be of the same opinion, or of a different opinion, is of no consequence in the decision of this case. We have no appellate power over the Commissioner, and no right to review his decision. That decision and his action taken thereon were made and done in the exercise of his official functions. They were by no means merely ministerial acts. (*United States ex rel. Dunlap* v. *Black*, 128 U. S., 41, 48, 49.)

If the supreme court of the District has not this power in respect of the executive departments in general, *a fortiori*, it has it not in respect of a department to which Congress has expressly confided judicial functions. (*Gaines* v. *Thompson*, 7 Wall., 347, 353.)

In this latter case the finality of the land department's construction of the statute, so far as review upon applications for mandamus or injunction in courts of the District of Columbia are concerned, is conclusively established; and the distinction between such a review and a direct proceeding in a court having jurisdiction over the lands to decree the equitable title to belong to the person against whom the department had decided, and to compel the conveyance of the legal title accordingly, is expressly marked out. (Ibid., pp. 353, 354.)

In this connection it may be observed that none of the

cases upon which the plaintiff in error relies in respect of the finality of the land department's decision are cases of mandamus or injunction against the Secretary of the Interior. The statement that the land department acts finally only with respect to questions of fact, and that its decisions on questions of law are subject to review, is altogether misleading unless it be strictly limited to the sort of proceeding which we have already pointed out. They are not subject to review in the supreme court of the District of Columbia.

II.

It is also stated in the reply brief that the land department has no power to determine controverted questions of fact upon *ex parte* affidavits; and that the court of appeals erred in failing to distinguish between the administrative function of the land department and its *quasi* judicial function; which latter function, it is said, does not come into operation until a case is made by a contest between rival claimants. (Reply brief, p. 1, pp. 32–37.)

So far as the interests of the United States are concerned this supposed distinction between the administrative and the judicial functions of the department is purely illusory.

In passing upon the application of a private individual to take lands belonging to the public domain, the Land Department always and everywhere acts judicially. Regarded from the standpoint of rival claimants such an application by one individual is, in a sense, *ex parte;* but in its main and important aspect

as an attempt to appropriate that which is, and would otherwise remain, a part of the public domain, such an application is adversary. It is not the right of a third party but the right of the Government which is in question.

Weber v. *Shappell*, 1 L. D., 76, 77;
Condon v. *Arnold*, 2 L. D., 96, 97.

So, when a contestant fails to prosecute an appeal and thus abandons the contest, the Land Department has still jurisdiction to consider the evidence whether or not an entry should be canceled. (*In re Rynerson*, 7 L. D., 177, 180.)

It is of no consequence that the Department to which is confided the decision of the applicant's claim is also the Department to which is confided the protection of the Government's interest. In point of fact it is this very duty to protect the Government interests that makes every proceeding in the Land Department an adversary proceeding.

> The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the Government, which is a party in interest in every case involving the surveying and disposal of the public lands. (*Knight* v. *U. S. Land Asso.*, 142 U. S., 161.)

I.

> It is no answer to say that third parties are not concerned, for the Government is an interested party, and the Secretary of the Interior is in duty bound to see that the disposition of every part of the public domain is in accordance with law, and the regulations of his Department. *Witherspoon* v. *Duncan*, 4 Wall., 218; *Lee* v. *Johnson*, 116 U. S., 48; *Williams* v. *United States*, 138 U. S., 48; *Hyde et al.* v. *Warren et al.*, 14 L. D., 576, 587.

The application of this principle to the case at bar is perfectly obvious. The act of June 4, 1897, provides that a person having certain qualifications may, by doing certain things, obtain in lieu of land of a certain character other lands of a certain character belonging to the public domain.

Being the tribunal to which is confided the care and custody of the public domain as well as the decision and determination of the rights of the persons seeking the benefit of this law, the Land Department has clearly the power to say what allegations, evidence, or proof will be sufficient, will satisfy it that the conditions prescribed by the act for the taking of this part of the public domain have been complied with. It is its duty to see that no part of the public domain is disposed of to a person not entitled to it. It is equally its duty to see that no person shall take any part of the public domain to which he is not entitled. It says to the applicant: Relinquish the land by a sufficient deed; show me that you are the owner and have a

clear title; produce an affidavit that the land you propose to select is unoccupied and nonmineral and so vacant land open to settlement; and if there is no contest by any other private claimant and nothing to put me upon notice that your statements do not truly represent these facts, these allegations will satisfy me and you shall have a patent.

But these things the selector declined to do; and the very decision of the Land Department which he now seeks to overturn, was to this effect: "You have not presented the proofs which I said would satisfy me; therefore, your selection is not complete; and now, by your admission as to the nature as well as to the condition of the land, you can never furnish such proofs, and your selection must always remain defective and incomplete."

III.

The third point which we desire to comment upon is that the petition for mandamus alleges that the lands in question are vacant and that the defendant in error does not deny that allegation.

But the court will observe that the petition for mandamus does not state that the application to the Land Department alleged that the lands were vacant. This case must be determined upon what was alleged and made known to the Land Department in the proceeding invoking the jurisdiction of that Department. If the lands were, in truth, vacant and unoccupied at the time of selection, the Land Department was the place to make that fact known. And it was because

the selector failed and refused, when presenting his selection, to make that fact known that the Secretary was constrained to hold that the selection was incomplete and defective, and insufficient to authorize the issuance of a patent. Being incomplete no title could possibly vest as of its date. No patent then could lawfully issue upon it. And, as we have already many times pointed out, the selection remaining incomplete up to the time of the hearing before the Secretary, the then undisputed fact that the lands in question were occupied, that mining operations were going on upon them and that petroleum in immensly paying quantities was then being pumped out of them, precluded the possibility that the defective selection could ever be completed by the required proof.

That the present averment by the plaintiff in error is of no importance to the true decision of this case and requires no denial by the Secretary is confirmed by the plaintiff in error itself, when, in another part of the reply brief, it insists that the "Secretary did not, and could not, upon the case presented by the appeal from the Commissioner's action, determine that the lands in question were not vacant lands open to settlement at the time of selection." (Reply brief, p. 34.)

But how is the Secretary to be required to admit or deny that which he was not called upon and could not have been called upon to consider or determine? The Secretary has no personal knowledge of the lands or as to whether they were, on December 14, 1900, unoccupied and nonmineral and so vacant lands

open to settlement. All he knows he knows officially by reason of the proofs before him, and in his return in answer to the demand that he should be forced to issue a patent, he says to the selector in effect, "You failed to inform me when you made this selection that the lands were unoccupied and nonmineral. The protestants informed me upon oath that they were both occupied and mineral. Having failed to make the required proof of the facts upon which it depended, your selection was manifestly incomplete. From your admissions on the final hearing before me it became plain that you could never make them complete. It is immaterial whether you are now willing to say in the supreme court of the District of Columbia what you failed to say before me."

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